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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. IRENE FIGUEROA, Defendant and Appellant.	E064239 (Super.Ct.No. RIF1500250) OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge. Affirmed.

Stephanie M. Adraktas, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., Randall Einhorn and Lise S. Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Irene Figueroa guilty of assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).)[1] The trial court sentenced defendant to prison for a term of four years. Defendant raises three arguments on appeal. First, defendant contends her right of due process was violated when the trial court instructed and permitted argument on the issue of aiding and abetting. Second, in the alternative, to the extent defendant's trial counsel forfeited the foregoing due process issue, defendant contends her trial counsel rendered ineffective assistance. Third, defendant contends the prosecutor relied upon a legally invalid theory. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. ASSAULT

Michael Renteria (Victim) was six feet two inches tall, and weighed approximately 300 pounds. In late September 2014, Mario Renteria (Father) and his son, Victim, were inside a grocery store in Riverside. Father watched as defendant left the store with items for which it appeared she had not paid. Approximately 10 days later, on October 2, Father and Victim again saw defendant inside the grocery store. Father spoke to a store manager about defendant's activities inside the store. When Father and Victim were leaving, Victim loudly said, "[P]eople like this should get a job and not steal." Defendant was nearby; she looked at Father and Victim.

[1] All subsequent statutory references will be to the Penal Code unless otherwise indicated.

Father and Victim exited the grocery store. Defendant then exited the store and ran to a vehicle in which a man (Companion) was waiting. Defendant pointed to Father and Victim. The vehicle defendant ran to was approximately 30 to 40 feet from Father and Victim's vehicle and along the path to Father and Victim's vehicle. As Father and Victim walked to their vehicle, past the vehicle in which Companion was waiting, Companion said, "'What are you looking at, motherfuckers?'" Companion yelled, "'I'm talking to you, motherfuckers.'" Companion, then standing by his vehicle holding a car steering wheel lock, e.g. the "Club," in his hands, yelled, "'I'm going to fuck you guys up.'"

Victim said to Companion, "'Put that thing down and we'll see what's going to happen.'" Defendant and Companion walked toward Father and Victim. Defendant was holding vise grips. Companion yelled, "'I'm going to fuck you guys up. I'm going to kill both of you guys.'" Companion swung the steering wheel lock, as he stood approximately five feet away from Father and Victim. Victim advised Father to stay outside their vehicle on the theory that Companion would smash one of the vehicle's windows if they entered it. Defendant and Companion yelled, "'You guys should mind your own business.'" Victim told Companion to put the steering wheel lock down so they could "go man to man." Defendant spoke on her telephone, "asking for other people to come down to the scene."

Victim moved between Father and Companion so Father would not be struck. At that point, Companion swung the steering wheel lock at Victim; Victim was hit in the head. Victim grabbed the steering wheel lock and it came apart, so Victim was holding

a small piece of the lock. Victim wrestled Companion to the ground. Victim stood over Companion, punching Companion; Companion punched back. Victim backed away from Companion in order to better survey his surroundings; he was aware defendant had vise grips, and he did not want to be struck by the vise grips.

Companion stood up, and within seconds attacked Victim. Victim again wrestled Companion to the ground. Defendant used vise grips to strike the back of Victim's head or neck. Victim let Companion get off the ground. Companion and defendant left in their vehicle. Two minutes later police arrived. Victim went to the hospital where he received seven staples in his head. The head injury was due to the blow from the steering wheel lock.

B. COMPLAINT, PRELIMINARY HEARING, AND INFORMATION

A First Amended Felony Complaint charged defendant with two counts: (1) assaulting Victim with a deadly weapon, in particular vise grips (§ 245, subd. (a)(1)); and (2) assaulting Father with a deadly weapon, in particular vise grips (§ 245, subd. (a)(1)).

At the preliminary hearing, defendant's counsel argued, "[T]his is a case that's clearly defense of others and a case of self-defense.'" The prosecutor responded, "Basically she was aiding and abetting the assault by the male subject." The trial court found sufficient cause to hold defendant to answer for the assault against Victim, but not against Father.

The Information charged defendant with one count, as follows: "The District Attorney of the County of Riverside hereby accuses [defendant] of a violation of Penal Code section 245, subdivision (a), subsection (1), a felony, in that on or about October 2, 2014, in the County of Riverside, State of California, [s]he did willfully and unlawfully commit an assault upon [Victim], with a deadly weapon other than a firearm, to wit: VISE GRIPS, within the meaning of Penal Code sections 667 and 1192.7(c)(31)."

C. TRIAL

During closing arguments, the prosecutor argued that Victim faced a "two-on-one attack[, which] is more intimidating than a one-on-one confrontation." The prosecutor asserted, "The victim was unable to completely defend himself continuously against [Companion] because the defendant was right there with the vise-grip pliers. Threatening continuously with the vise-grip pliers. Enabling [Companion] to continue the attack."

Defense counsel argued that defendant witnessed Victim "pummeling" Companion, and she tried to defend Companion. Defense counsel explained that defendant was acting in defense of another, and therefore was not guilty.

During a recess, outside the presence of the jury, the trial court said, "As [the prosecutor] was making his closing argument, he was arguing I think what he used was group attack. He used that in several ways and suggested that [defendant] and whomever this other person was were operating in concert. [¶] I looked at [CALCRIM

No.] 400 while he was making that argument.[2] And what I became concerned about was my instructional duty. The Court has a sua sponte, that means on its own motion, duty to instruct on aiding and abetting when the prosecutor relies on it as a theory of culpability."

Defense counsel replied, "I looked at CALCRIM 400 and 401. Obviously, if the Court feels inclined to give the instructions, I would just object to it. But the Court's going to make its own ruling in regards to that." The trial court explained, "He never used the term 'aid and abet,' but he functionally argued that to the jury. And I think I—the instructions say I have a sua sponte duty under those circumstances." Defense counsel questioned how the specific intent to aid and abet interplays with defense of another. The court responded, "[Y]ou only get to defend—or you only get to use self-defense when it's necessary under the circumstances." Defense counsel expressed concern that the jury could be confused if it found defendant aided and abetted but also acted in defense of another.

The prosecutor agreed that the court should instruct the jury on aiding and abetting. (CALCRIM Nos. 400, 401.) The court ruled that the instructions would be given after closing arguments.

In the prosecutor's rebuttal closing argument, he asserted defendant did not act in defense of others because she was holding the vise grips before Victim was struck by Companion. The prosecutor explained Victim was unable to "devote his entire attention

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[2] CALCRIM No. 400 is the general instruction for aiding and abetting.

to the male that was swinging at him because the defendant was hovering over him with the vise-grip pliers." The prosecutor further argued that defendant did not have a right of defense because Victim was lawfully defending himself against Companion when defendant struck Victim. The prosecutor summed up his argument as follows: "So there is two separate reasons why the defendant is guilty: her own actions, her own swinging of the vise-grip pliers; and also, her actions in support of the attack by the male."

The trial court instructed the jury on the law of aiding and abetting. Almost immediately after the jury had been released for deliberations, defense counsel expressed concern that the defense's closing argument had ended prior to the court's decision to instruct on aiding and abetting. Defense counsel said, "I believe that may have prevented me from at least addressing some points that [the prosecutor] was free to address. [¶] Had I known about the instructions, I certainly could have planned for that within my closing . . . ." The court, prior to the lunch recess, said it would give counsel "whatever" amount of time counsel needed to argue the aiding and abetting issue.

After the lunch recess, the trial court reopened closing arguments. The court gave defense counsel 10 minutes and the prosecutor five minutes to address the limited issue of aiding and abetting. Defense counsel believed 10 minutes was "more than enough" time. Defense counsel argued to the jury that aiding and abetting was inapplicable in this case. Defense counsel argued that defendant was not holding the vise grips at the beginning of the altercation, and thus the attack was not two-on-one as argued by the prosecutor. Defense counsel asserted the evidence supported a finding

that defendant picked up the vise grips after the altercation had progressed, in order to defend Companion. Further, defense counsel argued there was insufficient proof that defendant knew Companion intended to commit a crime, and as such, could not have aided and abetted Companion.

The prosecutor argued the evidence reflected defendant held the vise-grip pliers from the beginning of the altercation, as she and Companion approached Father and Victim. The prosecutor argued, "And because of that, and because of what she did with those pliers and her assistance with the attack on [Victim], she's guilty in this case[] for two separate grounds, for two separate reasons. Two reasons: The defendant's own actions and, also, actions of defendant's partner. [¶] When I say 'or' there, it's because she is guilty—you don't have to find that she's guilty in both ways. If she is guilty in at least one of those two ways, she is guilty of the assault with a deadly weapon."

DISCUSSION

A. DUE PROCESS

Defendant contends the trial court violated her right of due process by instructing the jury on aiding and abetting and reopening argument, on the topic of aiding and abetting, because the trial court permitted constructive amendment of the Information.

"Under California's practice of short-form pleading, an instrument charging a defendant as a principal is deemed to charge [her] as an aider and abettor as well. (§ 971.) This 'notice as a principal is sufficient to support a conviction as an aider and abettor . . . without the accusatory pleading reciting the aiding and abetting theory.'" (*People v. Quiroz* (2013) 215 Cal.App.4th 65, 70 (*Quiroz*).)

"A criminal defendant also has a federal constitutional right to '"be informed of the nature and cause of the accusation."' [Citation.] It is unsettled whether California's short-form pleading practice, without more, confers constitutionally adequate notice of the People's decision to proceed on an implicitly charged alternative legal theory." (*Quiroz*, *supra*, 215 Cal.App.4th at p. 70.) However, notice of a new theory is constitutionally adequate when the defendant is "alerted to the theory by the evidence presented at the preliminary hearing." (*Ibid.*) "What due process will not tolerate is the People affirmatively misleading or ambushing the defense with its theory." (*Id.* at p. 71.) We apply the de novo standard of review to this constitutional issue. (*People v. Cromer* (2001) 24 Cal.4th 889, 894.)

At the preliminary hearing, the prosecutor argued defendant was not acting in defense of Companion, rather, "she was aiding and abetting the assault by [Companion]." Thus, at the preliminary hearing, the prosecutor gave defendant express notice that he would be proceeding on the implicitly charged aiding and abetting theory. The evidence at the preliminary hearing reflected (1) defendant "approached the [beginning of the] altercation with a pair of vise grips in her hand"; (2) Companion struck Victim with a steering wheel lock, and (3) defendant struck Victim with the vise grips as Victim was "struggling on the ground with [Companion]." This evidence is consistent with an aiding and abetting theory because defendant's actions with the vise grips assisted Companion. Therefore, in addition to the prosecutor expressly stating he was relying on an aiding and abetting theory, the evidence also alerted the defense to the

implicitly pled aiding and abetting theory. As a result, defendant had sufficient notice of the prosecutor's intent to proceed on an aiding and abetting theory.

Defendant contends she was not given adequate notice of the implicit aiding and abetting theory because the Information charged defendant with assault with vise grips, not aiding and abetting the assault with a steering wheel lock. The Information charged defendant with assaulting Victim with vise grips. Under either theory of the case—defendant as principal, or defendant as aider and abetter—she used the vise grips, either to perform her own assault or as the instrument to aid and abet. Therefore, the Information is correct that she needed to defend against her use of the vise grips. (See *People v. Jones* (1990) 51 Cal.3d 294, 317 ["'in modern criminal prosecutions initiated by informations, the transcript of the preliminary hearing, not the accusatory pleading, affords defendant practical notice of the criminal acts against which [s]he must defend'"].)

Nevertheless, to the extent the Information (1) should not have included a weapon; (2) should have included the steering wheel lock in addition to the vise grips; or (3) should have only listed the steering wheel lock, the error is harmless. (See *People v. De La Roi* (1944) 23 Cal.2d 692, 697 [the particular weapon need not be alleged].) "[I]n cases where a new theory is introduced late in the game for reasons other than prosecutorial gamesmanship, courts have employed a harmless error test. That test looks to whether the late notice 'unfairly prevented [defense counsel] from arguing his or her defense to the jury or . . . substantially mis[led] [counsel] in formulating and presenting arguments.'" (*Quiroz*, *supra*, 215 Cal.App.4th at p. 71.)

Defense counsel argued the aiding and abetting issue to the jury. Two theories were offered on the topic: (1) there was insufficient proof of the scienter element (see *People v. McCoy* (2001) 25 Cal.4th 1111, 1117 [mens rea for aiding and abetting]); and (2) defendant only picked up the vise grips in an attempt to defend another. The aiding and abetting instructions were given prior to the lunch recess. The court gave defense counsel the lunch recess to decide if he wanted to argue the aiding and abetting issue, which means, to the extent counsel was surprised by the issue, he had the lunch recess, from noon to 1:25 p.m., to develop arguments to address the aiding and abetting topic. Given that counsel had time to develop an argument, and was permitted to argue the issue to the jury, we conclude the late notice—to the extent there was late notice—did not prejudice defendant.

Defendant contends she was prejudiced by only vise grips being listed in the Information because (1) her trial counsel focused on defendant's right to defend Companion from Victim's attack, and the right to defend arose after the Victim was struck with the steering wheel lock; and (2) her trial counsel argued the vise grips were not a deadly weapon, unlike the steering wheel lock.

It is unclear what defendant would have done differently if the charge in the Information had omitted the vise grips or included the steering wheel lock. As explained *ante*, defendant's trial counsel provided two arguments on the topic of aiding and abetting: (1) there was insufficient proof of the scienter element; and (2) defendant only picked up the vise grips in an attempt to defend another, i.e., she was not holding

the vise grips until the end of the altercation and therefore did not aid and abet the steering wheel lock assault.

This second argument is consistent with the theory of the case that defense counsel had been presenting—that defendant was only acting in defense of another. The theory was that defendant picked up the vise grips only after Victim repeatedly punched Companion, because defendant was trying to intervene and defend Companion. Under that theory, defendant would not be guilty of assault because she was defending another, and she would not be guilty of aiding and abetting because she was not holding the vise grips when Companion was holding the steering wheel lock. Defendant's trial counsel's theory was reasonable and consistent. We see no prejudice incurred by defendant as a result of the aiding and abetting theory being presented to the jury.

Defendant contends a showing of prejudice is not required because the issue presented involves an alleged due process violation. Contrary to defendant's position, a showing of prejudice is required. As explained *ante*, the harmless error test looks to "whether the late notice 'unfairly prevented [defense counsel] from arguing his or her defense to the jury or . . . substantially mis[led] [counsel] in formulating and presenting arguments.'" (*Quiroz, supra*, 215 Cal.App.4th at p. 71; see also *People v. Witt* (1975) 53 Cal.App.3d 154, 165 ["where no prejudice is shown"].)

B. INEFFECTIVE ASSISTANCE OF COUNSEL

In the alternative, to the extent the foregoing due process issue was forfeited, defendant contends her trial counsel was ineffective for failing to raise a complete objection. Defendant's trial counsel objected when the trial court said it believed it had

a sua sponte duty to instruct the jury on aiding and abetting. Due to that objection, we conclude defendant's trial counsel preserved the issue for appellate review. As a result, we addressed the merits of defendant's contention, *ante*. Therefore, we do not address the substance of the ineffective assistance of counsel issue.

The People contend defendant forfeited the appellate issue concerning aiding and abetting because defendant did not object to the prosecutor's argument. We disagree with the People. Defendant's trial counsel's objection to the instructions was sufficient to preserve the matter for appellate review, because counsel called the trial court's attention to the issue. (See *People v. Saunders* (1993) 5 Cal.4th 580, 590 [forfeiture rule applies because a party cannot conceal a potential error from the trial court and then seek reversal on appeal].)

C. INVALID THEORY

Defendant contends she could not properly be convicted of aiding and abetting the assault with the steering wheel lock because she was charged with assaulting Victim with vise grips. Defendant asserts the steering wheel lock theory is invalid, and therefore, because a valid theory and an invalid theory of guilt were argued to the jury, her conviction must be reversed.

A trial court may, in its discretion, permit amendment of the information at any stage of the proceedings, provided the amendment does not change the offense charged by the original information to one not shown by the evidence taken at the preliminary examination. (§ 1009; *People v. Winters* (1990) 221 Cal.App.3d 997, 1005.) If the defendant's substantial rights would be prejudiced by the amendment, the court may

grant a reasonable continuance no longer than the ends of justice require. (§ 1009; *Winters*, at p. 1005.) "Trial court discretion, in granting a motion to amend, 'will not be disturbed on appeal in the absence of showing a clear abuse of discretion.'" (*People v. Bolden* (1996) 44 Cal.App.4th 707, 716.)

As set forth *ante*, the Information charged defendant, in relevant part, as follows: "a violation of Penal Code section 245, subdivision (a), subsection (1), a felony, in that on or about October 2, 2014, in the County of Riverside, State of California, [s]he did willfully and unlawfully commit an assault upon [Victim], with a deadly weapon other than a firearm, to wit: VISE GRIPS, within the meaning of Penal Code sections 667 and 1192.7(c)(31)."

As explained *ante*, at the preliminary hearing the evidence reflected (1) defendant "approached the [beginning of the] altercation with a pair of vise grips in her hand"; (2) Companion struck Victim with a steering wheel lock, and (3) defendant struck Victim with the vise grips as Victim was "struggling on the ground with [Companion]." The foregoing evidence reflects defendant aided and abetted Companion by holding the vise grips at the beginning of the altercation, thereby requiring Victim to divide his attention between two attackers. Further, at the preliminary hearing, the prosecutor argued, "[S]he was aiding and abetting the assault by [Companion]." Thus, the prosecutor provided defendant with explicit notice of the aiding and abetting theory.

Arguably, the Information would have been clearer if it (1) omitted the particular weapon used in the attack; or (2) included the steering wheel lock as a weapon involved

in the attack. (See *People v. De La Roi*, *supra*, 23 Cal.2d at p. 697 [the particular weapon need not be alleged].) Thus the trial court, in effect, permitted constructive amendment of the Information by instructing the jury on aiding and abetting in relation to the steering wheel lock and permitting closing argument on the assault with the steering wheel lock.

The constructive amendment was permissible because (1) the amendment conformed to the evidence and argument presented at the preliminary hearing; and (2) defendant was given an hour and 25 minutes to compose a 10-minute closing argument on the issue. As a result of that hour and 25 minutes, defendant's trial counsel argued two points to the jury that were consistent with points previously made: (1) defendant did not handle the vise grips until Companion was on the ground being punched, as a result, she did not aid and abet his actions with the steering wheel lock; and (2) because defendant was not involved in the early portions of the altercation, she lacked the scienter for aiding and abetting.

Given that (1) evidence of the aiding and abetting was presented at the preliminary hearing; (2) aiding and abetting was argued at the preliminary hearing; (3) defense counsel was given over an hour to create a 10-minute closing argument on the issue of aiding and abetting; and (4) defense counsel presented a rational and consistent closing argument on the issue of aiding and abetting, we conclude the trial court acted reasonably in permitting the Information to be amended. As a result, there was no error, and the jury could permissibly base its conviction on the aiding and

abetting theory. (See *People v. Davis* (1992) 8 Cal.App.4th 28, 45 [prosecutor can rely on two theories—defendant as principal or as aider and abettor].)

DISPOSITION

The judgment is affirmed.

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MILLER
J.

We concur:

RAMIREZ
P. J.

SLOUGH
J.